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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 358

THOR CORPORATION,

Petitioner,

against

MAYFLOWER INDUSTRIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF OF PETITIONER.

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In urging that the decision below was correct, and that there is no conflict with other decisions, respondent misstates the claims in the complaint.

Respondent argues that its complaint alleges "a single and unitary injury—the loss of a valuable distributorship business" (p. 10). However, a reading of the complaint reveals that the loss from the alleged tort claim was only the distributorship business in Northern New Jersey, while the loss from the basic claim for breach of contract in-

cludes the distributorship business in the more important area of New York.

The complaint does not allege that Teldisco even had knowledge of the termination of the distributorship of respondent in areas outside of Northern New Jersey, much less that Teldisco participated in any way in the alleged breach outside of Northern New Jersey. This is not only clear from the allegations but is confirmed by the demand for relief, which, as against Teldisco, is confined to Northern New Jersey, but which, as against Thor, relates to New York as well as New Jersey.

The satisfaction of a judgment for the loss from the tort would still leave a cause of action against Thor alone for breach of contract relating to the territories outside of Northern New Jersey. In view of this indisputable fact, nothing could be more clear than that more than one cause of action is stated in the complaint.

The attempt of respondent to treat this as a case like *Bentley* v. *Halliburton Oil Well Cementing Co.*, 174 F. (2d) 788 (5th Cir.) and *Edwards* v. *E. I. Du Pont de Nemours & Co.*, 183 F. (2d) 165 (5th Cir.), which involved only one cause of action against two defendants who are jointly liable for all the alleged injuries or losses sustained is simply not supported by this complaint.

Indeed, even the majority opinion of Judge Hastie recognizes the existence of two claims in the instant case (R. 625), and this is pointed out in the dissenting opinion of Judge McLaughlin (R. 632-633).

The significance of *American Fire and Casualty Co.* v. *Finn*, 181 F. (2d) 845 (5th Cir., 1950) pending on Writ of Certiorari, October Term, 1950, No. 252, is that it held that three causes of action, each of which related to the same identical loss, were separate and independent. This

is in direct conflict with the opinions of the majority in the instant case.

Judge Hastie, in the majority opinion below, stated that "separate and independent" connoted "absence of some significant connection" (R. 625). This not only conflicts with the *Finn* decision, and the two District Court decisions cited in our Petition for Certiorari (p. 9) but differs from the dictionary definitions, none of which defines independent as meaning unrelated or unconnected. The Court in the *Finn* case treats "separate and independent" as meaning separate and distinct rather than separate and unconnected. Separate and distinct is also the meaning given to "separate and independent" by Professor Moore, in his *Commentary on the Judicial Code* (1949) pp. 250-251.

The fact that the claims were in the *alternative* in the *Finn* case did not make them more separate or independent than in this case. Quite the reverse is true. Because the claims were in the alternative, recovery on any one of the three claims in the *Finn* case would have barred recovery on the others. Here recovery against Thor and Teldisco on the claim for the alleged joint tort relating to Northern New Jersey would not bar recovery against Thor alone for the alleged breach of contract relating to the territories outside of Northern New Jersey. Clearly a claim which is not barred by recovery on another claim is *more* independent of that claim than one that is barred by such recovery.

It is therefore respectfully submitted that if the claims in the *Finn* case are separate and independent, then *a fortiori* the contract claim in this case is separate and independent from the tort claim.

Moreover, since the decision of this cause below the Court of Appeals for the Third Circuit, with all of the

judges sitting *en banc,* has held a seaman's claim for maintenance and cure, asserted in a civil action, to state a cause of action "separate and independent" from a companion claim under the Jones Act for damages for negligence (*Jordine* v. *Walling,* No. 10,018, decided November 10, 1950 overruling *Lindquist* v. *Dilkes,* 127 F. 2d 21). The factors deemed decisive were that the claims were not co-extensive in scope, that one claim sounds in tort where the other is quasi-contractual, and that one claim does not bar the other, though the same damage may not be recovered twice. These factors in determining whether causes of action are "separate and distinct" for the purposes of measuring the pendent jurisdiction of the District Courts in suits arising under federal law are equally significant, we submit, in determining whether causes of action are "separate and independent" for purposes of removal jurisdiction under Section 1441(c) of Title 28 of the United States Code. When so tested, the causes of action in the instant case are separate and independent for precisely the same reasons as given in *Jordine* v. *Walling, supra.*

Consequently, there is not only a clear conflict between the decision of the Third Circuit in the instant case and that of the Fifth Circuit in the *Finn* case, but between the decision of the Third Circuit in the instant case and that of the same Circuit in the *Jordine* case.

The point upon which the Court below rested the order for remand in the instant case was clearly and solely its interpretation of the language "separate and independent" because, as we have already seen, the majority opinion of Judge Hastie as well as the dissenting opinion of Judge McLaughlin agreed that two claims or causes of action are stated in this complaint.

Thus, the conflict with the *Finn* case is on the meaning of "separate and independent" in Section 1441(c) of Title 28 of the United States Code and that is the point on which the decision in each case turns.

Respondent's Arguments on the Merits.

In its brief, respondent advances arguments on the merits to support its contention that certiorari should not be granted. It even refers to a suit instituted against it in the Courts of New York by E. B. Latham & Co. and makes unfounded charges against Thor in connection therewith. Many of respondent's arguments are unsupported by the record and are without foundation in fact. All of them are premature. Petitioner can meet all of these arguments. We believe it to be sufficient to point out that such arguments only show the lengths to which respondent feels compelled to go to avoid an adjudication by this Court that this cause was properly removed to the United States District Court.

Respectfully submitted,

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